

September 15, 2006

Jaime H. Rivera, M.D., F.A.A.P.
Director Public Health
Department of Health & Social Services
Jesse Cooper Building
P.O. Box 637
Federal & Water Sts.
Dover, De. 19903

RE: DPH Unpublished Proposed Personal Assistance Regulations [August 7, 2006 Draft]

Dear Dr. Rivera,

The Developmental Disabilities Council has reviewed the unpublished draft of regulations for Personal Assistance. The regulations are intended to implement H.B. No. 190 which was signed by the Governor on June 27, 2006.

We offer the following observations.

1. In Section 1.0, the scope of services qualifying under the definitions of “companion” and “homemaker” are almost identical. Both definitions encompass housekeeping, cooking, and shopping. DPH may wish to adopt definitions clarifying distinctions between companion and homemaker services since they are treated as discrete categories elsewhere. See, e.g., definition of “Direct Care Worker”.

2. Some personal assistance agencies (e.g. Comfort Keepers) include transportation (e.g. to store; medical appointment) within their menu of services. DPH may wish to include this as an authorized service under one or more of its definitions (e.g. homemaker or companion). Cf. Section 5.1.5.1 reference to transportation.

3. There is a conflict between the definition of “direct care worker” in Section 1.0 and Section 4.8.4. Section 1.0 exempts persons with 1 year experience from completing a training course. Section 4.8.4 contains no such exemption.

4. In Section 1.0, definition of “licensee”, consider substituting “legal” for “public”. There is a definition of “legal entity” and, I suspect, there will be few governmental (a/k/a public) personal assistance services agencies. This would also conform to use of the term “legal entity” in the definition of “owner”.

5. The definition of “parent agency” requires it to be located within 50 miles of any branch. I agree with Easter Seal’s objection to this standard. The standard would disallow an administrative office in Wilmington linked to a branch office in Georgetown.

6. The definition of “personal assistance services”, first sentence, would benefit from insertion of “for compensation” after “services”. Otherwise, the “sweep” of the standards is too

broad and would encompass a church sending volunteers to help an elderly parishioner, the Boy or Girl Scouts sending scouts to help with yard work/housecleaning, or agencies sending volunteers for clean-up assistance after Katrina-type events.

7. In Section 1.0, the grammar in the definition of “residence” is faulty.
8. In Section 2.3.1.1.1, consider substituting “conform” for “have demonstrated a willingness to comply”. This creates an objective rather than a subjective (“willingness”) standard. A similar amendment would be appropriate in Section 2.3.2.2.2.
9. In Section 2.3.2.1, consider substituting “may” for “shall” to ensure greater DPH discretion.
10. There is some tension among the regulations in the context of agency non-conformity with regulations. Some provisions (e.g. Sections 2.3.2.1.1, 2.2.2.1, 2.4.5.6.1) only require “substantial compliance” which could be interpreted as 80-90% conformity. Other provisions (e.g. Section 2.4.1.1) adopt a stricter standard. There should be consistency.
11. Section 2.4.4 contemplates issuance of a “new” license after a suspension. DPH may wish to clarify whether the new license would be probationary (Section 2.3.1) or provisional (Section 2.3.2) or either (in discretion of DPH). Section 2.4.5.4 suggests that the license could be either probationary or provisional after “termination”..
12. In Section 2.3.5.1, DPH may wish to add “suspension” to the list of reasons for termination.
13. Section 2.4.5 authorizes a 2 year license. This is inconsistent with Sections 2.3.2.1, 2.3.3.1 and 2.3.3.2.
14. Unless the definition of personal assistance services is amended consistent with Par. 6 above, Section 2.9 could be expanded to ensure that agencies providing non-compensated volunteers are exempt from licensing. DPH may also wish to exclude cleaning services and yard service companies. DPH should exempt entities licensed as home health agencies under Title 16 Del.C. Section 122(o).
15. In Section 2.9.1, we recommend inserting “or employee” after “individual contractor”.
16. Consistent with Easter Seal’s recommendation on Section 2.9.5, the exclusion for attendant services should envision some agencies may be dually licensed to provide both attendant and personal assistance services.
17. Section 3.2 could be expanded to conform more closely to Section 5.5.6.
18. Section 3.13 effectively requires the director to be available 24/7 for agencies that provide day and night shift services. This may not be realistic. Contrast Section 4.2.3 (authorizing appointment of back-up administrator).

19. **We strongly recommend** that Sections 3.14 and 5.1.5.2 could be strengthened to include a more affirmative obligation to provide substitute coverage. Consider the following standard:

The agency shall have policies and an operational system which assure uninterrupted implementation of the plan for services. In furtherance of this requirement, the agency shall, at a minimum: 1) maintain a sufficient pool of qualified employees or contractors to fulfill service plans and provide scheduled services; and 2) develop and maintain a back-up system to provide substitute direct care workers if regularly scheduled direct care workers are unavailable.

20. Section 4.1.6 requires annual review of bylaws. This may be unnecessary. Few organizations review bylaws annually.

21. Section 4.4.3 could be improved. The definition of “direct care worker” in Section 1.0 envisions the “caretaker” to be either an employee or contractor of the agency. In contrast, Sections 4.4.3.2, 4.4.3.6, 4.4.3.7, and 4.4.3.8 only refer to “contractors” and “contracted individuals”.

22. In a similar context, Section 4.4.3.1 appears to only authorize one model, i.e., consumer agreement with agency to provide personnel. However, Section 4.4.2 is somewhat cryptic in contemplating contractors who provide services “not provided by the agency”. Historically, some agencies (e.g. Griswold) acted as referral entities for “independent contractors” who were paid directly by consumers. It is unclear if such a “broker” model is still an option under the regulations. This should be clarified. For example, Section 4.4.3.7 appears to authorize direct payment by the consumer to a contractor rather than to the agency. Cf. Section 5.1.4 and Title 16 Del.C. Section 122(x)1 and 6 C [contemplating licensing of “referral” agencies].

23. In Section 4.4.2, DPH may wish to substitute “provided by employees of the agency” for “provided directly by the agency” in Section 4.4.2.

24. The requirement of participation in 40 hours of training (Sections 4.8.4) could be a deterrent to persons willing to serve as personal assistants. This is a “judgment call”. If there is a current shortage of persons willing to work in this capacity, a 40 hour training requirement may exacerbate the shortage. The regulations do not address whether the employee or contractor is paid by the agency to complete the training or the annual 12 hour continuing education requirement in Section 4.8.9. Compare the CNA regulations [8 DE Reg. 1014 (January 1, 2005)]. You may consider the merits of a subsidy for an established training through the agency for personal assistants.

25. Section 4.8.5 and 4.8.10 could be improved by including orientation to common assistive technology (“AT”). Compare Section 5.4.6.2.

26. In Section 5.4 the limitations are overbroad. Compare Title 24 Del.C. Section 1921(a)(19) [authorizing consumer delegation of health care acts not prohibited by regulations] and implementing regulations at 8 DE Reg. 1683, 1690 (June 1, 2005)]. Section 5.4.1.3 would prohibit

a personal assistant from putting on a bandaid!

27. In Section 5.4.5.1, consider inserting “or adaptive” between “common” and “feeding utensils”.

28. Section 5.4.6 is overbroad. It would prohibit a personal assistant from transferring any infant (e.g. even from a crib to a playpen) or child.

29. Consistent with Title 24 Del.C. Section 1921(a)(19), Section 5.4.9.2 is overbroad. At a minimum, the consumer should be able to direct the personal assistant to open a bottle and place the medication in the consumer’s hand.

30. In Section 5.5.13.3, the time period (5 calendar days) for reporting “major adverse incidents” is too long.

31. In Section 5.6.3, it would be preferable to require 30 days notice prior to discharge rather than 2 weeks. Compare Title 16 Del.C. Section 1121(18).

32. If a “broker” model is an option, the insurance provision in Section 8.1 may be underinclusive. The insurance may only cover the agency and not “contractors”. Compare Section 4.4.2 (differentiating between services provided by contractors and by the agency). Workers Compensation Insurance should also be addressed. See comments from Easter Seal.

The Developmental Disabilities Council thanks you in advance for your consideration of our comments. Should you have any questions regarding these please contact our office at 739-3333.

Sincerely,

Jamie Wolfe
Chair

cc. Lisa Scheiffert, DHSS
Governor’s Advisory Council for Exceptional Citizens
State Council for Persons with Disabilities